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No. 90-1623

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

S.E. JOHNSON COMPANY, *et al.*,
Petitioners,

v.

ARTHUR S. LANGENDERFER, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Petitioners, S. E. Johnson Company, et al. (collectively "Johnson") submit this Reply to the opposition of Respondents (collectively "Langenderfer").

Langenderfer's opposition does not address two important questions under the antitrust laws:

1) Whether monopoly power may be found in a government contract bid market absent collusion where there are many competitors and entry has occurred;

2) Whether a monopolist's lawful, above-cost pricing gives rise to antitrust injury.

Instead, Langenderfer ignores the opinion of the Sixth Circuit, ignores its own trial evidence and falsely accuses Johnson of misrepresenting the facts to the Court. The facts supporting Johnson's Petition are found in the Sixth Circuit's opinion.

Entry in the Bid Market

Langenderfer contends there were high barriers to entry in the bid market, no new entry, domination of market capacity by Johnson, and an insufficient number of competitors. These assertions were not supported by the evidence and were not sustained by the Sixth Circuit.

- The Sixth Circuit observed that there were "additional, substantial competitors in the marketplace for asphalt paving" (App. A14), and that "[o]ther competitors, not parties in this case, have emerged as bidders on these jobs during the relevant years" (App. A70).
- Langenderfer's *own* evidence at trial disclosed new entrants (Tr. at 330-31, 642-43; Px 31E, 164, 166).
- Langenderfer's *own* evidence at trial showed 51 firms bidding, and 23 winning jobs in the relevant market after Langenderfer's exit (Px 31D, 32A, 34A, 34B, 41A, 71B).

Langenderfer's assertion that the finding of monopoly power can be sustained by examining the capacity of the firms in the market is inapposite for two reasons: 1) the Sixth Circuit relied on market share, not capacity; and 2) the presence of 51 bidders and 23 winners belies any contention that Johnson controls a monopoly share of productive capacity. In

short, this case squarely presents the question of whether a firm may achieve monopoly power in a bid market free of collusion in which there are other competitors and in which entry has occurred.

Monopoly Power In The Raw Material Markets

Langenderfer asserts that this is not a predatory pricing case. Johnson agrees: Johnson's low, above-cost bids were lawful.

Langenderfer contends, however, that it suffered antitrust injury because Johnson subsidized low bids with monopolistic profits from sales of stone and sand to bidding competitors. Opposition at 7. Langenderfer ignores the evidence it introduced at trial, and disregards the Sixth Circuit's determination that there was no basis for finding monopoly power in any raw material market.

- The Sixth Circuit held that there was no showing that Johnson controlled the sources or supply of sand (App. A12, A17, A29, A53).
- The Sixth Circuit held that Johnson did not have monopoly power in limestone (App. A33-34, A40).
- Langenderfer's evidence showed that Johnson was only the second largest limestone producer (France Stone was larger), and that none of the competitors depended on Johnson for limestone. (Px 21, 21A; Tr. at 270, 1917).

Absent monopoly power in raw materials, and the opinion below establishes there was none (App. A55), the only conduct that might have injured Langenderfer is Johnson's admittedly lawful bids.

Conclusion

For the reasons stated, Petitioners request this Court to grant their Petition so that the important questions presented may be reviewed. Indeed, since Respondents have failed to address the questions presented, Petitioners suggest that summary reversal is now in order.

Respectfully submitted,

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